

APR 26 2010

D.N.R.C.

April 19, 2010

Department of Natural Resources and Conservation  
Water Resources Division  
Hearings Unit  
1424 Ninth Avenue  
PO Box 201601  
Helena MT 59620-1601

RE: Petition for Declaratory Ruling and Request to Amend Rule 36.12.101(13);  
Mr. Joe Lamson, Hearing Examiner

Dear Mr Lamson:

We are writing in support of the petitioners in the issue concerning ground water and water rights affected by water appropriation regulations identified in the above Petition, regulations promulgated by the Department of Natural Resources and Conservation (Department.) Stillwater Protective Association (SPA) is an affiliate of the Northern Plains Resource Council. Our organization is an advocate for responsible natural resource management and we strive to ensure that rural interests are fairly treated as Montana's resources are developed and used by industry, housing developers, and governments throughout Montana. SPA, as its name implies, is specifically interested in these issues as they apply to Stillwater County and its watersheds.

The management and use of water is of particular interest to us, since it has been recognized since the early days of settlement of the West that our area is arid to semi-arid, and water is scarce. Balancing water use between development and natural resources is always difficult. Rural use of water and the economic vitality of the rural areas of the state depend on fair application of water law. One person or entity's water use may well affect the livelihood and well being of others. Thus, from the beginning of the settlement of Montana water law has been an important component of land use, and because of its scarcity the doctrine of first in time, first in right has become well established as the basis of fair treatment for investments in land improvements and economic development. Further because "of widespread interest in making substantial appropriations of water in the Yellowstone River basin, [the legislature] finds that

these appropriations threaten the depletion of Montana's water resources to the significant detriment of existing and projected agricultural ... and other uses..." (MCA 2009, 85-2-601) (all further MCA references are to MCA 2009, so the 2009 is omitted) Because of conditions in the Yellowstone watershed the legislature has established as state policy that before proposed appropriations are acted upon, existing rights must be accurately determined for their protection.

Given this emphasis on the Yellowstone River watershed, it is incumbent on the State of Montana to exercise added caution in the recognition of further water appropriation in any part of the basin, even though MCA 85-2-101 makes clear that all waters of the State are subject to **appropriation** for beneficial uses (emphasis added,) albeit temporary and subject to final adjudication. MCA 85.2.311 clearly states that water appropriated before adjudication must show that the water source has been identified and that prior valid appropriations will not be harmed. MCA 85.2.317 further states that groundwater appropriations are subject to the MCA 85.2.311 criteria.

Under subdivision law, MCA Title 76 Chapters 3 and 4 state that a subdivision consists of all parcels, whether contiguous or not. Chapter 3 also authorizes local authorities to prescribe standards for lot design and arrangement, as well as manage them to ensure the general benefit of all parcel owners, including their access to water. Thus a single well on a single parcel within a subdivision clearly is not an entity unto itself, but rather part of the whole subdivision.

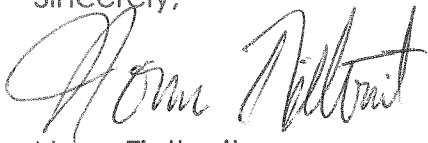
With this body of law, we do not understand how the Department could have modified the original understanding of the term, "combined appropriation" in the case of multiple wells appropriating water from a common source. Until 1993, the rule followed closely the wording in the MCA, which in Part 85.2.306 (3) (a) states in part, that no exception to the requirement for an appropriation permit can be granted when a "combined appropriation from the same source from two or more wells exceeding [the statutory limitation] requires a permit." When the legislature has declared the Yellowstone watershed an area where increased scrutiny must be applied to applications for water appropriation; when subdivision law clearly states that the several parcels within any subdivision are a single project; and when water use law just as clearly states that new appropriations must consider all prior appropriations on the same source, and cannot be permitted unless the prior appropriation can continue to serve its intended purpose, the Department cannot arbitrarily modify all those provisions of the MCA to construe that the only way to understand a combined appropriation is if the wells are "physically manifold into the same system."

A logical process can only conclude that the meaning of all of MCA Title 85, Water Use is carefully crafted to protect prior appropriation of beneficial and

legitimate use of Montana waters. Particularly with regard to subdivision wells, the Department cannot ignore other sections of MCA that indicate subdivisions are a single entity, a single project. Thus their aggregate use of water through the drilling of single domestic wells must be viewed as a combined appropriation of waters of the State of Montana. When that combined use has the potential to affect prior appropriators of water within the same source, then the Department must restrict the later filings for water appropriation so that the prior appropriations can be used for their intended purposes. Combined appropriation in the case of a subdivision can only be construed to mean the total water use of all parcels within that subdivision, whether or not it is connected through a centralized water system and whether or not it shares a common set of conveyor piping.

SPA believes that you must find in favor of the petition and revise the regulations at Rule 36.12.101(13) ARM.

Sincerely,

A handwritten signature in cursive script, reading "Norm Tjeltveit".

Norm Tjeltveit  
President  
Stillwater Protective Association

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